U.S. Department of Labor

Wage and Hour Division
Washington, DC 20210

FLSA2018-26

November 8, 2018

Dear **Name***:

This letter responds to your request for an opinion concerning whether your client, a company that operates and maintains swimming pool facilities at hotel, motel, apartment, and condominium buildings, is an "amusement or recreational establishment" under Section 13(a)(3) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 213(a)(3). This opinion is based exclusively on the facts you have presented and does not address whether your client satisfies Section 13(a)(3)'s seasonality requirement. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

BACKGROUND

Your letter represents that your client contracts with the operators and owners of dozens of hotel, motel, apartment, and condominium buildings to exclusively operate and maintain the swimming pool facilities at those properties. Your letter explains that your client employs its own lifeguard and pool service staff at each location to perform lifeguard, maintenance, and cleaning services, and that your client's employees perform no additional work at those properties outside of operating and maintaining the pool facilities.

GENERAL LEGAL PRINCIPLES

The FLSA's minimum wage and overtime requirements in 29 U.S.C. §§ 206–07 do not apply to certain seasonal "amusement or recreational establishment[s]." 29 U.S.C. § 213(a)(3). An employer is a qualifying amusement or recreational establishment if it is (1) "an establishment" (2) "frequented by the public" (3) "for its amusement or recreation." *See* 29 C.F.R. § 779.385. Department regulations define each of these elements as follows:

First, an "establishment" is a "distinct physical place of business," as opposed to "an entire business or enterprise." 29 C.F.R. §§ 779.23, 779.303; *see, e.g.*, *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 496–97 (1945); *see also Chen v. Major League Baseball Props., Inc.*, 798 F.3d 72, 79 (2d Cir. 2015) (holding that the definition of "establishment" in 29 C.F.R. §§ 779.23, 779.303 applies to Section 13(a)(3)). Multiple business operations on the same premises and even under the same roof, however, may constitute separate establishments if each operation (1) is physically separated, (2) functionally operates as a separate unit having separate records and bookkeeping, and (3) does not exchange employees more than occasionally. 29 C.F.R. § 779.305; *see also Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1158 (11th Cir. 2008) (holding that the three-part test for separate establishments in 29 C.F.R. § 779.305 applies to Section 13(a)(3)). All three elements must be satisfied for the different

operations to constitute separate establishments. *See* 29 C.F.R. § 779.305; *Gilreath v. Daniel Funeral Home, Inc.*, 421 F.2d 504, 510 (8th Cir. 1970).

Second, an establishment is "frequented by the public" if it is generally accessible to the public. *See* 29 C.F.R. § 779.385 ("Typical examples of such are the concessionaires at amusement parks and beaches."). Merely charging a fee for access does not preclude an establishment from being "frequented by the public." *See id.;* WHD Opinion Letter WH-312, 1975 WL 40936, at *1 (May 7, 1975) (stating that country clubs with nonprohibitive fees may be frequented by the public); *see also Chen*, 798 F.3d at 79 (noting that DOL uses the language of "frequented by the public" to "broadly" define the amusement or recreational establishment exemption).[1]

Third, an establishment is frequented by the public "for its amusement and recreation" if it exists for the purpose of amusement or recreation—such as a stadium, golf course, swimming pool, summer camp, skating rink, zoo, or other similar facility. *See, e.g.*, WHD Opinion Letter, 1999 WL 1002367, *1 (Feb. 18, 1999); WHD Opinion Letter FLSA-717, 1986 WL 1171127, at *2 (May 12, 1986). Moreover, a separate establishment whose "primary purpose is to establish, provide, maintain, and promote … recreational facilities and activities" also exists for amusement and recreation, even if its employees do not perform "traditional amusement or recreational activities." *Hamilton v. Tulsa Cty. Pub. Facilities Auth.*, 85 F.3d 494, 496–98 (10th Cir. 1996); *see also* WHD Opinion Letter FLSA2003-1, 2003 WL 23374597, at *3 (Mar. 17, 2003) ("The nature of the employer's business, not the work performed by a particular employee, determines whether establishment-based exemptions … apply.").

OPINION

Based on the facts you have provided, the swimming pools that your client's management business services constitute amusement or recreational establishments for purposes of Section 13(a)(3) provided that the pool facilities are physically separated and nonresidential occupants may frequent them.

First, because hotel, motel, apartment, and condominium properties ordinarily do not qualify as amusement or recreational establishments, *see, e.g.*, WHD Opinion Letter FLSA-1276, 1994 WL 1004822, at *1 (May 6, 1994), each of the pools that your client operates must be physically separated from the hotel, motel, apartment, or condominium to qualify as a separate amusement or recreational establishment. *See* 29 C.F.R. § 779.305. Common examples of a physically separated pool facility include a rooftop or adjacent outdoor pool in a distinct physical space used exclusively for pool-related operations. On the other hand, examples of physically integrated pool facilities are restricted indoor pools within penthouse suites or pools with poolside food and beverage service from hospitality or residential staff. *Cf.* WHD Opinion Letter FLSA-830, 1972 WL 34909 (June 8, 1972) (stating that pool services that are "an integral part of the apartment building and motel" are not exempt). Additionally, the physically separated pool facility must conduct its business operations separately from the hotel, motel, apartment, or condominium. *See* 29 C.F.R. § 779.305. Because your client employs its own

[1]Some courts reject the statement in 29 C.F.R. § 779.385 that an amusement or recreational establishment must be "frequented by the public." *See Brock v. Louvers & Dampers, Inc.*, 817 F.2d 1255 (6th Cir. 1987); *Ivanov v. Sunset Pools Mgmt. Inc.*, 567 F. Supp. 2d 189, 193 (D.D.C. 2008).

staff at each swimming pool to exclusively perform pool services, its business operations appear functionally independent. *Cf. id.*[2]

Second, your client's operations are not "frequented by the public" if the pool facilities are restricted to renters and property owners. *Cf.* WHD Opinion Letter FLSA-830, 1972 WL 34909 (stating that "private pools" are not exempt). Your client's operations will qualify for the exemption, however, if the pool facilities are generally accessible to nonresidential occupants. This is true even if access is restricted to paying customers. *Cf.* WHD Opinion Letter WH-312, 1975 WL 40936, at *1 (stating that country clubs with nonprohibitive fees and nonexclusive membership may be frequented by the public).

Finally, your client's business operations (providing lifeguard and maintenance services) exist for the purpose of amusement or recreation because their primary purpose is the operation of an amusement or recreational facility—a swimming pool. *Cf. Hamilton*, 85 F.3d 497–98 (holding that a company that manages entertainment fairgrounds "provid[es] 'amusement and recreation' to the public"); WHD Opinion Letter FLSA-1033, 1986 WL 1171081, at *1 (Jan. 17, 1986) (stating that beach lifeguard services fall within the amusement or recreational establishment exemption). This is true regardless whether your client owns the swimming pools that it services. *Cf. Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 595 (11th Cir. 1995) (holding that a baseball team that maintains and operates, but does not own, baseball stadium facilities is an amusement or recreational establishment).

We trust that this letter is responsive to your inquiry.[3]

Sincerely,

Bryan L. Jarrett
Acting Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).**

[2] We assume that this operational independence includes separate records and bookkeeping. *Cf.* 29 C.F.R. § 779.305.

[3] We withdraw WHD Opinion Letter FLSA-830, 1972 WL 34909, to the extent that its conclusions are inconsistent with this letter. *See also Ivanov*, 567 F. Supp. 2d at 193 (holding that a pool management company was an "amusement or recreational establishment" and rejecting the 1972 Opinion Letter's contrary conclusion because the letter's rationale "is lacking," does not comport with subsequent WHD guidance and case law, and is therefore "due little respect").